U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE: September 25, 1990
CASE NO. 83-CTA-152

IN THE MATTER OF

DEPARTMENT OF LABOR,

v.

CITY OF DAYTON, OHIO.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA or the Act), 29 U.S.C. §§ 801-999 (Supp. V 1981),[1] and regulations promulgated thereunder at 20 C.F.R. Parts 675-690 (1990). The grantee, City of Dayton, filed exceptions to that part of the Decision and Order (D. and 0.) of Administrative Law Judge (ALJ) Daniel Lee Stewart, upholding the Grant Officer's disallowance of CETA funds used to satisfy a back pay judgment in favor of a subgrantee's former employee. The case was accepted for review in accordance with the provisions of 20 C.F.R. § 676.91(f).

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[1] CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

BACKGROUND

The questioned expenditures in this case, in addition to the funds used to pay the back pay judgment, included funds paid to several other CETA program participants who were found to be ineligible. The back pay judgment arose out of a lawsuit based on unlawful termination filed in 1977 by Lillian Harris, a former employee of Comprehensive Manpower Center (CMC), a subgrantee of the City of Dayton. Joint Exhibit (JX) 1, tab B. CMC wanted to appeal the back pay judgment and order of reinstatement, but alleges it was unable to obtain an appeal bond necessary under Ohio law to stay execution because of lack of assets. Exceptions by City of Dayton at 2-3. The City of Dayton declined to represent CMC at any stage of the proceedings because the City Charter did not authorize representation. Exceptions by City of Dayton at 2. To overcome this problem, the parties stipulated that Ms. Harris agreed to a stay of execution if CMC would establish an escrow account with sufficient funds to cover all back pay due if it lost on appeal. The stipulation was approved by the common Pleas Court of Montgomery County, Ohio, and the escrow account was established and funded with CETA funds. JX-1, tab F. CMC lost its appeal and the parties entered into a settlement whereby CMC agreed to forego any further appeals in exchange for Ms. Harris relinquishing her right to reinstatement and accepting the balance in the escrow account as payment in full for back pay due. Exceptions by City of Dayton at 3; Transcript (T.) at 123.

In his final determination, the Grant Officer disallowed $59,581.00, the amount placed in escrow and used to satisfy the back pay judgment, because the costs did not benefit the grant and were not necessary and reasonable for proper and efficient administration of the grant programs. The Grant Officer also disallowed an additional $30,068.00, representing funds paid to several ineligible CETA program participants, for a total of $89,649.00 in disallowed expenses. JX-1, tab B.

At the hearing, the parties stipulated that the total amount in controversy was $88,514.00. T. at 10. Of this figure, the parties further agreed that the allowability of a $98.00 expenditure would be governed by another case. T. at 10-11.

The ALJ upheld the Grant Officer's disallowance of the escrowed amount based on the reasons articulated in the Grant Officer's Post-Trial Brief at 17-21. The reasons specified were that (1) the escrow was not a necessary and reasonable cost or allocable since no benefit was received by the grants, 41 C.F.R. § 1-15.703-l; (2) the escrow was an unallowable contingency reserve, 41 C.F.R. § 1-15.713-2; (3) the escrow was not an appropriate accrued expenditure since the money was not provided in exchange for work performed, services rendered or any other type of exchange: 41 C.F.R. § 29-70.207-2(a); (4) placing CETA money in escrow violated the requirement that the time between the transfer of funds from the treasury and the disbursement of funds by the recipient be minimized, 41 C.F.R. § 29-70.207-2(e); and (5) the back pay award was an unallowable cost incurred

as a result of violations of applicable law, 41 C.F.R. § 1-15.713-5.[2/] D. and 0. at 4. The ALJ reversed the Grant Officer's disallowance of $10,081.00 in costs attributable to two participants, D. and 0. at 3, but affirmed the remaining disallowances. The total amount of costs disallowed was $78,335.00. D. and 0. at 5.

DISCUSSION

On appeal, the Grant Officer, citing United States v. Orleans, 425 U.S. 807, 817 (1976), Rizzo v. Goode, 423 U.S. 362, 373-77 (1976) and De Tore v. Local 8245 of the Jersey City Public Employees Union, 615 F.2d 980, 983-84 (3d Cir. 1980), argues that CETA funds cannot be used to satisfy a judgment because the Department of Labor cannot be liable for unlawful acts or vrongful conduct of a subgrantee. Brief of the Grant Officer at 5-8. The Grant Officer also contends that the funds used to satisfy the back pay award are not allowable CETA costs because, under 41 C.F.R. §§ l-15.603-2(6), 1-15.701-1,[3/] the funds were neither paid for services rendered nor necessary and reasonable for the efficient administration of the grant program. [4/] Brief of the Grant Officer at 9.

[2/] All references to 41 C.F.R. are to the 1984 edition.

[3/] The Grant Officer apparently intended to cite 41 C.F.R. § 1-15.703-l.

[4/] At this stage of the case, the Grant Officer is not relying on any of the other regulations cited in his Post-Trial Brief.

In response, the City of Dayton contends that the escrowed money should be an allowable cost because 20 C.P.R. § 676,91(c) specifically states that back pay may be appropriate under CETA. Brief of City of Dayton at 8. The City also argues that the Grant Officer's determination, if upheld, would have the effect of inhibiting the exercise of good-faith management decisions by encouraging grantees and subgrantees to retain unacceptable or unproductive employees whose employment otherwise might be terminated. Reply Brief of City of Dayton at 2-3.

As previously noted, the back pay recipient in this case was dismissed from her employment and filed suit contesting the dismissal in 1977. Although the Act and regulations in effect at the time did not specifically authorize back pay awards, the United States Court of Appeals for the Sixth Circuit, the circuit within which this case arises, has held, in partial reliance on existing administrative policy, that even prior to the amendment of the Act in 1978, back pay awards were a proper remedy when the circumstances required. [5/] Commonwealth of Kentucky, Department of Human Resources v. Donovan, 704 F.2d 288, 296 (6th Cir. 1983). See In the Matter of Allen Gioielli, Case No. 79-CETA-148, slip op. at 9-10, Sec. Decision, January 18, 1982; In the Matter of James Preti v. Town of Middleboroush, Case No. 79-CETA-174, slip op. at 4, ALJ Decision, January 28, 1980: In the Matter of San

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[5/] Without question, the Grant Officer, acting under the authority of 29 U.S.C. § 816(f) (Supp. V 1981) and 20 C.F.R. § 676.91(c), now has the authority to award back pay in appropriate circumstances. City of Philadelphia v. U.S. Department of Labor, 723 F.2d 330, 332 (3d Cir. 1983).

Diego and Regional Employment and Training Consortium, Termination of Randall McFadden and H.J. Parker, Case No. 78-CETA-107, slip Op. at 5-6, ALJ Decision, June 29, 1978. Contra City of Great Falls v. U.S. Department of Labor, 673 F.2d 1065 (9th Cir. 1982).

In Commonwealth of Kentucky, the court rejected the argument that the back pay award could not be ordered against a state out of non-CETA funds. It noted that the 1978 regulations made clear that the states receive CETA grants laden with conditions and liability. The states are free to accept the CETA grants and the concomitant regulations, or forego the federal funding and remain free of regulation. Inasmuch as Kentucky chose to accept the CETA funds, the court ruled that the Department of Labor was within its authority in awarding back pay against Kentucky. 704 F.2d at 298-300. See also Milwaukee County. Wisconsin v. Donovan, 771 F.2d 983, 997 (7th Cir. 1985), cert. denied, 476 U.S. 1140 (1986) (County ordered by Department of Labor to award back pay plus interest from non-CETA funds).

The instant case differs from Commonwealth of Kentucky in that a state court, rather than the Department of Labor, issued the back pay order. [6/] In either case, however, the Department of Labor has the same legal interest, assuring that CETA funds are spent for appropriate purposes. I therefore conclude that

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[6/] In cases of unlawful discharge, the Department of Labor may order such corrective measures as are necessary. 29 U.S.C. § 816(f) (Supp. V 1981). Individuals, however, are not precluded from pursuing private civil actions. 29 U.S.C. § 816(l) (Supp. V 1981).

the rationale in Commonwealth of Kentucky supports the Grant Officer's determination in this case to disallow the use of CETA funds to satisfy a court ordered back pay award.[7] Accordingly, I affirm the ALJ's decision upholding the Grant Officer's disallowance of $59,581.00 in CETA funds spent to satisfy the back pay award. [8]

Finally, although as the City of Dayton contends, management decisions concerning the possible dismissal of employees may be more difficult if the grantee must pay back pay awards out of its own funds in cases of unlawful termination, I disagree that this necessarily inhibits the exercise of good faith management

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[7] The City of Dayton argues that the ALJ's decision in this case is inconsistent with the decision in Department of Labor v. City of Dayton, Case No. 82-CPA-23, June 25, 1984, in which another ALJ allowed CETA funds to be used to pay the attorney fees incurred in defending the legal action which resulted in the escrow. If the attorney fees are allowable, reasons the City, the judgment itself should be allowable. Exceptions by City of Dayton at 6. I reject this argument. Unlike the back pay situation, attorney fees are made allowable by the Act and regulations. 29 U.S.C. § 825 (f) (Supp. V 1981); 41 C.F.R. § 1-15.711-16.

[8] In view of my decision to affirm the AL7 based on Commonwealth of Kentucky, I need not address the Grant Officer's contention that the expenditure of the escrowed CETA funds should be disallowed under the reasoning of Rizzo, DeTore and Orleans. would, nevertheless, find these cases inapposite as the City of Dayton argues. Reply Brief of City of Dayton at 3-4. Each case essentially stands for the proposition that, under agency principles, a higher level entity is not legally responsible for the unlawful acts of another organization unless there is direct involvement or an established agency relationship. See 423 U.S. at 377; 615 F.2d at 983; 425 U.S. at 818-19. The cases all address the issue of a higher level entity's liability for damages. They make no mention of the issue in this case, whether a grant from a higher level entity can be used to satisfy a judgment imposing liability on another organization.

decisions. [9] Where a grantee identifies an employee whose performance is unacceptable or unproductive, see Reply Brief of City of Dayton at 3, a dismissal action could be the best option even if the grantee must pay for a dismissal eventually found to be wrongful, particularly in cases where retention [10] could be considered disruptive of the entire CETA program. Given the alternatives, I believe that grantees will continue to manage their programs in a manner to enhance overall effectiveness, notwithstanding that in some instances there might be some financial consequences to their actions.

CONCLUSION AND ORDER

The Grant Officer's determination disallowing the $59,581.00 in funds paid to satisfy the back pay judgment is affirmed. The grantee, City of Dayton, is ordered to pay that amount and the

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[9] The City of Dayton has represented that CMC had no alternative other than to place CETA funds in an escrow account and use them to satisfy the judgment because CMC had no funds other than CETA funds. CMC was unable to obtain an appeal bond and the City was not authorized to represent CMC. Exceptions by City of Dayton at 2; Brief of City of Dayton at 6. While these factors may influence the implementation of management decisions, they are by no means insurmountable obstacles. The City of Dayton obviously has an interest in its subgrantee's programs being managed properly. To further its interest, the City could, among other things, amend its Charter to allow legal representation of subgrantees or appropriate funds necessary for subgrantees to pursue legal actions on their own.

[10] Although in some cases reinstatement of the dismissed employee could be ordered, the parties are free, as in this case, to override the reinstatement order by a monetary settlement.

$18,484.00 in disallowed costs found due by the ALJ, a total of $78,335.00, to the Department of Labor. This payment shall be from non-Federal funds.

SO ORDERED.

Elizabeth Dole

Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Department of Labor v. City of Dayton, Ohio

Case No. : 83-CTA-153

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on SEP 25 1990.

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